

NATIONAL PEOPLE'S PARTY OF S. AFRICA

27 APRIL 1992 .

COMMENT ON QUESTIONS RE CONSTITUTION-MAKING BODY (CMB)

1. Should the CMB be an elected body?

As explained in ^{our} previous memorandum, there are a number of pros and cons here:

(i) The main advantage attached to converting CODESA to the CMB lies in convenience and time-saving; the work of the CMB could get under way almost immediately. This option has in fact been proposed by some of the delegates to CODESA.

The Dikwankwetla Party's proposals are not very detailed. It is interesting that with the IFP, they are the only ones that plead for CODESA to be reconstituted as the CMB. Their arguments are not without merit: it is perfectly true that the legitimacy of the final constitution will depend on its acceptance by a measure such as a referendum rather than on the body which drafted the constitution. It is nevertheless true that acceptance in a referendum is more likely to be achieved if the representatives of the electorate are perceived to have played an active, first-hand role in the creation of the constitution, even if experts are employed to give technical and professional advice.

The Inkatha Freedom Party feels very strongly on this issue and their views merit serious consideration. The IFP objects to a constitution drawn by a CMB, for several reasons. The first is based on the reason for and the basis of any constitution, namely the protection of individual rights by limiting future legislators and in particular, future political parties numerically strong enough to render rights nugatory. It is pointed out that the majority may be democratically elected but not necessarily wise or even moral. Thus to entrust the writing of the constitution to a popularly elected assembly is to defeat the object of curtailing the power of such bodies.

Secondly, the Constitution must be drafted in such a way that inefficient or corrupt government should be easily removable. Any incumbent government's interests must necessarily run contrary to removability (the so-called "Worst enemy" argument). It could, of course, be pointed out that no matter how or by whom the Constitution is drafted, it should always be able to pass the "worst enemy" test, so that good government depends not on who is in power at a particular time, but on the supremacy of the Constitution. That is why it is so important to encourage the growth of a "rights culture" in SA, and why Mr Justice Olivier expressed doubt about the viability of any bill of rights in the absence of a rights culture.

The most important objection is based on logic: since the Constitution must decide on the electoral law, and the electoral law must govern the election of a CMB, the election of a CMB at this stage would be to put the cart before the horse. The argument that the CMB would not have a free hand because it will be bound by CODESA principles does not, according to the IFP, answer the electoral law argument; the CODESA principles are too vague to be a real guide-line; but, on the other hand, if they were detailed, they would render the CMB redundant.

Another point is that the IFP is still in favour of a federal state. Thus this question must be resolved before drafting can begin. Must we decide on federation beforehand; the IFP points out that no unitary state has ever been converted successfully into a federation.

Next it is shown that the history of constitution-making in Africa shows that the Namibian approach was an exception; most other states do not in fact have constitutions drawn up by a CMB. (One may question the success of some of these other constitutions, however; at this stage the Namibian Constitution does appear to be "working" fairly well, although it is very early to make a proper assessment.)

As regards the legitimacy issue: it is pointed out that CODESA itself is not representative, and therefore could not bind a sovereign elected body such as a CMB.

The IFP also noted that in fact it is not the CMB itself that draws a constitution; legal experts do the drafting which is subsequently ratified. It therefore proposes that a team be appointed to draft the constitution, to be ratified by referendum. The problem that arises here is that voters would have to take the constitution or leave it - there would be nothing in between.

(ii) The main objection to the conversion of CODESA into a CMB lies in the lack of legitimacy which would attach to a non-representative (non-elected) body. In fact, the majority of delegates have stated an express preference for a CMB elected by proportional representation. In general, the suggestion is that a large number of delegates be elected (300-400 in some cases) so that the CMB can be as representative as possible. Very few views are expressed about the particular system of proportional representation (PR) to be used - the Labour Party of South Africa has evidently done some research in this regard and suggests that the German hybrid model is worth considering. I think it essential that an in-depth study of PR models be undertaken before a choice is made. (For detailed information see D A Basson "Kiesstelsels van Proporsionele Verteenwoordiging" 1985 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 44 and W H Olivier in *Political Alternatives for Southern Africa: Principles and Perspectives* (1983) 335.) It is also generally agreed that a threshold of 5% support (which is customary) is too high: most propose either 1% or 2%.

1.1 Should this CMB be a bicameral body?

Here, too, there is general agreement that it should not; the one notable exception is the government's proposed transitional government with a legislature consisting of two chambers, one to be elected by a system of proportional representation, and the other on a regional

basis (in order to provide minority protection). This proposal has elicited a good deal of criticism, both for its general vagueness and for its attempt to entrench minority protection, itself a vague suggestion which has engendered suspicion of covert racism (rightly or wrongly). At this stage there seems to be little merit in the bicameral idea, although it is conceivable that the government may come up with more specific suggestions that could dispel the suspicions and criticisms currently attached to their proposal.

The Labour Party's proposal for a bicameral parliament with the CMB functioning as the upper house of the interim legislature and the revamped tricameral parliament as the lower house strikes one as very odd; a representative upper house with a veto over the legislation of a less democratic lower house is not a concept with which South Africans are familiar. Even if the CMB were to become the lower house and the present parliament converted into a type of senate, I cannot see what real benefit would ensue.

1.2 Should the decisions of the CMB be subject to special safeguards such as increased majorities?

There is no doubt that this is essential. The first safeguard would be election by proportional representation, which ensures a fair reflection of public opinion. Secondly, it is clear that important constitutional decisions should not be taken by simple majority vote; a two-thirds majority vote, at least, must be required - perhaps even a 75% vote or even full consensus may be considered. Consensus, as proposed by the government, is a good idea in theory, but could prove counterproductive in practice, since a party or delegate representing a very small section of the community could hold the majority to ransom indefinitely by the exercise of such a veto. On the other hand, as the IFP points out, even a requirement of a two-thirds majority implies that one-third of the delegates disagree, and in a matter as important as the writing of a constitution, this may well be too high.

2 How far should CODESA go in "fleshing out" the constitutional principles?

The Namibian experience could prove very useful here. The Namibian Constitution was based on the "1982 Principles" to which the Constituent Assembly adhered and which were treated with the greatest respect by all the parties. (For a detailed account, see Wiechers "Namibia: the 1982 principles and their legal significance" 1989/90 *South African Yearbook of International Law* 1 or *Namibia - Constitutional and International Law Issues* (ed Van Wyk, Wiechers and Hill) UNISA (1991). In brief, these principles were:

A Constituent Assembly to be elected by (i) universal franchise, to be exercised without discrimination or fear of intimidation; (ii) voting by secret ballot, with special provision for voters unable to read or write; (iii) full freedom of speech, assembly, movement and the press; (iv) an electoral system seeking to ensure fair representation for the various political parties.

This Constituent Assembly's task was to draft Namibia's Independence Constitution in accordance with the principles enunciated in B below and to approve the Constitution by a two thirds majority.

B The Principles

(i) Namibia to be a unitary, sovereign and democratic state.

(ii) The Constitution to be the supreme law, amendable only by a special process or referendum.

(iii) The Constitution to provide for a system of government with the three branches: a central legislature elected by universal suffrage; an elected executive responsible to the legislature; an independent judiciary. The executive and legislature to be re-elected by periodic elections held by secret ballot.

(iv) An electoral system consonant with the ideals stated in A above.

(v) A declaration of fundamental rights cataloguing all the universally recognised basic rights consistent with the Universal Declaration of Human Rights and enforceable by the courts.

(vi) No crimes to be created or penalties increased retrospectively.

(vii) Provision for the balanced restructuring of the public service, police and defence force in order to ensure equal access for all.

(viii) Provision for elected local and regional councils.

It is clear that many of these principles are already among the matters that have been agreed on by CODESA. It is therefore feasible for CODESA to produce a similar framework for the CMB to base its draft constitution on. Thorny issues that remain to be resolved include the question of the form of government to be adopted (unitary or federal, presidential or parliamentary) and concomitant with that, the issue of regional and local government and the degree of autonomy that is to be conferred. The warning must be sounded that these issues must indeed be successfully addressed before any substantial progress can be made with the Constitution as such.

For the valuable constitutional lessons to be learned from the Namibian experience, see Van Wyk "The making of the Namibian Constitution: Lessons for Africa" 1991 *Comparative and International Law Journal of Southern Africa (CILSA)* 341 esp at 349-350. In brief, these were: (i) the acceptance of the 1982 Constitutional Principles as a basic framework; (ii) the fact that the Constituent Assembly was not involved with the day-to-day government of the country (see point 4 below), thus avoiding political red herrings; (iii) the Assembly's procedure was laid down beforehand, so all parties knew that broad agreement would have to be reached; (iv) a strong sense of destiny and responsibility among the delegates; (v) the choice of chairman (*in casu* Mr Geingob); (vi) the fact that all parties came prepared with

draft constitutions; (vii) the facilitating role played by the smaller parties; (viii) the confidentiality of the standing committee's deliberations -no "playing to the gallery".

3 Should TBVC voters participate in the election of a CMB?

This is a very awkward issue: many people feel that these states are, and always have been, part of South Africa despite their technical independence, recognised only by South Africa. The realities are, however, that there are constitutional structures and governments in place. Thus even if the homeland leaders in question were to agree to participation in an election for a CMB, the legitimacy of their decision would be open to question (not to speak of the problems that would arise from a flat refusal to participate).

One of the major problems arising from the political system which held sway for so long in South Africa is the lack of knowledge about black public opinion: no-one really knows what the inhabitants of the TBVC states want. It is therefore somewhat presumptuous to assume that the majority of the people in these territories do in fact desire reincorporation into South Africa and that they should participate in an election for a CMB. This is yet another issue that must be resolved (perhaps by way of a referendum?) before the business of constitution-making can be started in earnest. It is well-known that there has, up to now, been little eagerness on the part of the TBVC delegates to test public opinion in their countries by way of referendum (although the Bophuthatswanan delegation has apparently changed its mind in this regard, now opting for a referendum rather than relying on the results of a general election). It must nevertheless be emphasised that from a technical legal point of view, at least, it is not acceptable merely to state that the 1910 boundaries of South Africa will be adhered to.

4 Should the CMB also act as the interim legislature?

I feel that this would be a very hazardous step indeed. (See the comment about the Namibian process above.) Not only would there be no

real check on the kind of legislation that could be adopted, but the same body would be performing two very divergent functions. It would perhaps be better for the CMB to concentrate on the new constitution and the present Parliament (adapted as suggested to do away with own and general affairs) to carry on with the day-to-day legislative matters as they arise - not all legislation will necessarily have a constitutional impact. In this way the CMB can devote all its energies to the business of constitution-making, which is going to be quite daunting enough without saddling it with ordinary legislation. There should be no reason why parliamentary legislation should not take cognisance of what is happening at CODESA, so that legislation can be adopted to fit in with the spirit of CODESA and be reconcilable with the new constitution.

The proposal of the Inyandza National Movement is that the CMB must possess parliamentary status, but that ordinary laws be passed by an ordinary majority and the constitution and bill of rights by a two-thirds majority. While one can understand the eagerness of Blacks in particular to see the demise of the tricameral parliament, it may be possible to circumvent some of the objections if the decisions of CODESA were to be made legally binding on parliament. This appears to be in line with the ANC's proposed Interim Government Council, although the proposal is not altogether clear.

The government's proposals also appear to be that the constitution should be drafted by an interim legislature created in terms of the transitional constitution. (The main difference, of course is that a bicameral parliament is mooted.)

If a transitional constitution can be agreed on, however, this option may indeed prove to be viable. In such a case we would be following much the same path as Namibia and the lessons learnt there would obviously be applicable to South Africa as well.

5 Is there a role for a referendum? If so, at what point in the constitution-making process?

I think it advisable that the draft constitution produced by the CMB should be accepted by both the CMB itself and by all citizens of the Republic, in both cases by a two-thirds majority. The other role that could be played by a referendum is in the TBVC states, as explained above (in regard to the question of participation in elections for a CMB - which is, in effect, a referendum about reincorporation). The referendum requirement must be specially provided for by statute to render it binding: as the law stands at present, what we loosely refer to as a referendum is in fact more correctly termed a plebiscite. In other words, it is not a binding constitutional measure but a formalised and controlled opinion poll which is not legally binding on the government.

It is important to note that the ANC is vehemently opposed to the idea of ratification of the constitution by referendum, arguing that elections for the CMB as proposed by it would guarantee legitimacy. It must be conceded that to hold first an election (for the CMB) and then a referendum would be both costly and time-consuming; and to return to the Namibian example once again, it was not deemed necessary to provide a "double guarantee" of legitimacy. In fact, however, the ANC proposals do provide for a referendum as well as an election, but at an earlier stage, i.e. to approve the resolutions of CODESA. It is a moot point whether it would be preferable for the general principles on which the constitution is to be based to be approved in a referendum, or the final product.

GENERAL COMMENTS ABOUT SOME OF THE OTHER SUBMISSIONS AND PROPOSALS

Some of the parties (including the ANC) suggest that an independent body of experts be appointed to resolve problems of interpretation of the general principles determined by CODESA. The ANC suggests a body along the lines of the French Conseil Constitutionnel, comprising persons who are not members of the CMB. It is emphatic that this function should not be conferred on the ordinary courts, since these lack general legitimacy, although members of the judiciary should not be debarred from serving on it. This is a proposal well worth considering.